EX PARTE OR LATE FILED

Rm 222

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

DOCKET FILE COPY ORIGINAL

APR 13 1993

MM 92-266

1800D
JH-8010
CN-9301273

OFFICE OF
THE CHAIRMAN

RECEIVED

APR 16 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Honorable Ernest F. Hollings
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
254 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Hollings:

Thank you for your letter regarding implementation of the rate regulation and programming access provisions of the Cable Television Consumer Protection and Competition Act of 1992.

The 1992 Cable Act adds new Section 623 to the Communications Act, which provides for regulation of basic and cable programming services. In its Report and Order and Further Notice of Proposed Rulemaking, adopted April 1, 1993, the Commission adopted regulations to implement Section 623. The 1992 Cable Act also adds new Section 628 to the Communications Act to prohibit unfair or discriminatory practices in the sale of video programming. The stated intent of this provision is to foster the development of competition to cable systems by increasing other multichannel video programming distributors' access to programming. In its First Report and Order, also adopted April 1, 1993, the Commission adopted regulations to implement Section 628. In both instances, the Commission endeavored to follow the plain language of the statute, as informed by the legislative history, and to effectuate its reading of Congressional intent based on its own judgement and expertise, in light of all comments received.

As you know, the Commission adopted rate regulations for cable systems on April 1, 1993, which, as a first step, could mean total savings to consumers of about one billion dollars. The Commission has developed a benchmark formula for basic tier and cable programming service rates that will enable regulators to approximate what the competitive rates should be for a given cable system with particular characteristics, and to require a noncompetitive system to reduce its rates to this level or by ten percent, whichever is less. Thus, the formula addresses your concerns that rates be set at competitive levels. The same benchmark will apply to both basic and cable programming services, also helping to alleviate your concern that consumers not pay more if operators split a formerly basic tier service into a basic and cable programming service tier. The benchmark formula applies to rates as of September 30, 1992. Thus, increases occurring after the passage of the Cable Act, but prior to the effective date of our rules are rolled back, another regulatory action which should stem your concern regarding potentially evasive actions taken by operators prior to the effective date of our rules. Moreover, as required by the 1992 Cable Act, and as you suggest,

No. of Copies rec'd 0+1
List A B C D E

the Commission has adopted standards for regulation of equipment used with basic cable and cable programming services based on the actual cost of such equipment.

With respect to the program access provisions of Section 19 of the 1992 Cable Act, your letter states your belief that price differentials are per se discriminatory unless they come within the allowances specified in Section 628(c)(2)(B). The Commission concludes in the First Report and Order that price discrimination will be deemed to occur if the difference in the prices charged to competing distributors is not explained by the factors set forth in the statute, which generally involve (1) cost differences at the wholesale level in providing a program service to different distributors; (2) volume differences; (3) differences in creditworthiness, financial stability and character; and (4) differences in the way the programming service is offered. The Commission concluded that these factors will permit sufficient latitude for legitimate and justifiable pricing practices common to a dynamic and competitive marketplace.

You also submit that no independent showing of harm is necessary in discrimination cases. The Commission concludes in the First Report and Order that complainants alleging violations of specific prohibitions of Section 628 regarding discrimination, exclusive contracts or undue influence will not be required to make a threshold showing of harm. The Commission states its belief that Congress has already determined that such violations result in harm. The Commission also holds, however, that the plain language of the statute requires complaints filed pursuant to the general prohibitions of Section 628(b) regarding unspecified unfair practices must demonstrate that an alleged violation had the purpose or effect of hindering significantly or preventing the complainant from providing programming to subscribers or consumers.

You additionally assert that Section 628 intends that after establishment of a prima facie case of discrimination by the complainant, the integrated programmer or cable operator has the burden of proof in defending its actions. The First Report and Order adopts a streamlined complaint process. The Commission's rules will encourage programmers to provide relevant information to distributors before a complaint is filed with the Commission. In the event that a programmer declines to provide such information, it will be sufficient for a distributor to submit a sworn complaint alleging, based

statute. The First Report and Order determines that exclusive arrangements between vertically integrated programmers and cable operators in areas not served by a cable operator are illegal and may not be justified under any circumstances. The First Report and Order also holds that exclusive contracts in areas served by cable (except those entered into prior to June 1, 1990) may not be enforced unless the Commission first determines that the contract serves the public interest. These determinations will be made on a case-by-case basis, following the five public interest factors set out in the statute.

The texts of these documents will be released shortly. I have enclosed copies of news releases that include detailed summaries of these items. Thank you for your interest in this matter.

Sincerely,

James H. Quello
Chairman

Enclosures

JHHalprin:syj:prd:MMB
Typed:04/06/93

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

MMB
CATV Rates
1273

If you have any problems receiving this transmission, please call 202-224-9360

DATE: 3-22-93 FAX #: 632-7092

TO: Lon Sizemore, FCC

FROM: Communications Subcmte

TOTAL # PAGES (INCLUDING COVER): 4

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

March 19, 1993

The Honorable James Quello
Acting Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Quello:

We are concerned that the Commission's proposals to implement the Cable Television Consumer Protection and Competition Act of 1992 (P.L. 102-385) appear inconsistent with the statute. We are particularly concerned about the

We believe that the reasonable/not unreasonable rate test for basic tier and cable programming services makes clear our resolve to eliminate all the monopolistic excesses from cable operators' charges. This regulatory standard must be applied carefully to emulate competitive market pricing.

The Act's implementation schedule presents the Commission with a formidable task. However, the cable industry's persistence in raising rates to excessive levels during consideration and after enactment of the 1992 Act makes it imperative that the Commission act quickly to protect consumers from price gouging.

In addition to protecting consumers through rate regulation in the absence of competition, Congress determined that it was necessary to encourage the development of competition to cable. The Act's access to programming provisions are designed to promote a fair and competitive multichannel video marketplace. Congress determined that a competitive marketplace would help to make available diverse sources of information at affordable prices.

The FCC's Notice of Proposed Rulemaking on the access to programming provisions, however, seems to be inconsistent with the clear intent of Congress as expressed in the Act. The Notice seeks comments on a number of approaches and concepts which appear incompatible with the straightforward mandate given to the Commission by Congress.

Congress concluded that the cable television industry dominates the nation's video market and, through concentration and vertical integration, the industry has erected anticompetitive barriers to entry by new programmers and distributors. The findings of the Act state definitively that a substantial governmental and First Amendment interest exists in promoting the diversity of views provided through multiple media and new technologies. However, the Notice improperly questions these findings and reopens issues which the Act dispositively resolves.

For example, the Notice proposes varying models for determining justifiable and discriminatory price differentials. One proposal suggests a pure antitrust analysis of price discrimination, imposing the burden of proof on complainants to demonstrate harm to the market. Each of the models requires additional showings of proof in clear contravention of the statute's plain language. Under the law, price differences are <u>per se</u> discriminatory unless the cable programmer can show that such differences meet one

of the four specific exemptions set out in the statute itself. Under the Act, after a complainant makes its prima facie case, the burden of proof lies with the vertically integrated cable programmer or cable operator that is alleged to be in violation. The statute does not grant the Commission the discretion to choose any other method of analysis of price discrimination or the ability to shift the burden of proof to cable's potential competitors.

Another example of the Notice's failure to recognize the statutory mandate is the FCC's proposal to create a safe harbor for exclusive contracts for new programming. Under the Act, the only instance in which an exclusive contract is permitted is upon a Commission finding that such an arrangement in an area served by cable is in the public interest, as determined by factors specified in the statute. There is no language to suggest that this very limited exception permits a blanket waiver of the statute's requirement of a case-by-case determination of the public interest. In fact, such a blanket waiver would undermine the Act's fundamental goal of promoting greater availability of programming to multiple video distributors and are inconsistent with the intent of the Act.

The above examples are illustrative, not exhaustive. The program access provisions were among the most intensely examined and vigorously debated aspects of the Cable Act. The resulting directives in the Act are clear.

Recent actions by some cable operators seem to demonstrate an intent to thwart the provisions of the Act. Therefore, your leadership at the Commission is needed now to ensure that the letter and spirit of the law are followed and the goals of the Act to protect consumers and encourage competition are fulfilled. We appreciate your attention to our concerns.

Sincerely,

JOHN C. DANFORTH
Ranking Republican

ERNEST F. HOLLINGS
Chairman

DANIEL K. INOUYE
Chairman
Communications Subcommittee